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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 1188

JAIME J. MERINO, *Petitioner,*

v.

UNITED STATES MARSHAL, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in the above entitled case entered on December 14, 1963. A petition for rehearing was denied by the same Court on January 21, 1964.

OPINIONS BELOW

The opinion of the Court of Appeals is reported in 326 F. 2d 5. The order denying the petition for rehearing is reported at 326 F. 2d 5. Prior appeals in the same matter, captioned *Merino* v. *Hocke, United States Commissioner*, are reported at 289 F. 2d 636 and 324 F. 2d 687.

JURISDICTION

The judgment of the Court of Appeals was entered on December 14, 1963. The petition for rehearing was denied on January 21, 1964. By order of this Court on March 27, 1964 the time for filing the petition was extended to and including May 19, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

Whether petitioner was deprived of the fair hearing to which he was entitled under 18 U.S.C. § 3184 and the Fifth Amendment by the ruling of the United States Commissioner, which denied him authorization to take depositions in Mexico which were essential to the presentation of his case?

Whether the District Court committed prejudicial error when it refused to review the evidence for any purpose other than ascertaining whether there was any evidence to sustain the Commissioner's finding that there was probable cause to believe that petitioner was guilty.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional and statutory provisions involved are the Fifth Amendment to the Constitution of the United States, 18 U.S.C. §§ 3184 and 3190. They are printed in Appendix A.

STATEMENT

On February 1 and April 12, 1960, an extradition complaint, and an amended complaint were filed before a United States Commissioner in the Southern Dis-

trict of California (R. 2 and 5). The Republic of Mexico sought to extradite petitioner pursuant to the Treaty of Extradition between the United States of America and the Republic of Mexico of February 22, 1899 [31 Stat. 1818]. The amended complaint alleged that petitioner had sought asylum in the United States, was in the United States, and had been charged with having committed in Mexico the crimes of falsification of official acts of the government on public authority, the uttering and fraudulent use of the same, and the embezzlement of public funds by a public officer while employed by Petroleos Mexicanos, an agency of the Government of Mexico in the capacity of Superintendent of a District during 1957 and 1958. The theory advanced by the United States on behalf of the demanding country was that petitioner acting in his capacity as a Superintendent diverted funds from Petroleos Mexicanos by falsifying contracts for construction. Prior to the commencement of the hearing before the United States Commissioner, petitioner filed a timely Notice of Motion and a Motion to Take Depositions (R. 11-12) supported by affidavit (Appendix C). The affidavit specifically stated the names and addresses of witnesses whose testimony was sought, wherein the testimony would be material, and why it was necessary for petitioner to have the use of such depositions at his hearing. Specifically petitioner contended that statements and testimony of witnesses which would be offered by the Government had been obtained as a result of threats and promises and that a number of witnesses were in the custody of the Republic of Mexico and not available to appear in his behalf. Petitioner contended that he could not receive a fair hearing and the United States Commissioner

could not make a responsible decision without such evidence. Authority to take the depositions was denied on May 26, 1960. Applications for a writ of mandamus were denied by the District Court on July 12, 1960 and April 27, 1962. Appeals to the United States Court of Appeals from the denials of the writs were dismissed. *Merino* v. *Hocke*, 289 F. 2d 636; *Merino* v. *Hocke*, 324 F. 2d 687.

At the hearing petitioner denied the wrongdoing alleged, argued that the Statute of Limitations had run on the offenses charged, and contended that the evidence introduced against petitioner did not establish an offense falling within the Extradition Treaty. On June 12, 1961, the United States Commissioner entered an order finding petitioner extraditable. Petitioner filed a petition for Writ of Habeas Corpus on June 21, 1961 (R. 2, 6, 80). Before the District Court petitioner argued that the Court should review the evidence to determine whether there was probable cause to believe that petitioner was guilty. The Court refused to determine whether there was probable cause and restricted its review to a determination of "whether there is any evidence warranting the finding of probable cause." (R. 85). The United States District Court entered an order dismissing the Writ of Habeas Corpus on April 3, 1963 (R. 85). The Court of Appeals affirmed the order.

REASONS FOR GRANTING THE WRIT

1. Petitioner was denied authorization to take any depositions in Mexico. These depositions were necessary for a fair hearing because in the absence of these depositions it was not possible for the United States Commissioner to assess the credibility of the witnesses

whose testimony formed the basis of the demand that petitioner be extradicted. To prevail in the extradition hearing it was necessary for petitioner to establish to the satisfaction of the Commissioner that the Government's evidence was insufficient to sustain the charge, that the Government's evidence was so unworthy of belief that it did not establish probable cause for believing that petitioner was guilty. To deny the right to take depositions in Mexico was the equivalent of holding that petitioner would be held extraditable if the Government could present a prima facie case. The issue of the weight to be given the Government's evidence ceased to be of importance.

The Commissioner apparently based his ruling on the decision of this Court seventy-four years ago in *Orteiza y Cortes* v. *Jacobus*, 136 U.S. 330, 336-337.

Petitioner submits that this Court should re-examine its holding that an accused in an extradition proceedings may not present testimony taken by deposition outside of the United States. The right to present such testimony is implicit in the statutory requirement that an accused receive a hearing. A denial of the right, deprives petitioner of a fair hearing required by the due process clause of the Fifth Amendment.

This Court has recognized the need for clarifying the nature of the hearing required in extradition proceedings and the importance of whether a party to the proceedings should have the right to take depositions when it granted the petitions for writs of certiorari in *Aristequieta* v. *First National City Bank*, 274 F. 2d 206, 365 U.S. 840, motion to vacate judgment granted, 84 S. Ct. 144, and *Aristequieta* v. *First National City Bank*, 287 F. 2d 219, 365 U.S. 40, motion to

vacate judgment granted, 84 S. Ct. 144. The right of an accused to take depositions and to introduce them in evidence is of even greater importance than the right of the demanding country.

2. In dismissing the writ of habeas corpus, the District Court limited its review to a determination of whether there was any evidence warranting the finding by the Commissioner that there was probable cause to believe petitioner was guilty (R. 85). The District Court refused to determine itself whether there was probable cause or to inquire whether the procedure followed by the Commissioner was adequate to afford a full and fair hearing or whether the material facts were adequately developed at the hearing. A broader review was denied on the authority of this Court's decision in *Fernandez* v. *Phillips*, 268 U.S. 311.

Petitioner submits that this Court should re-examine the premises upon which its decision in the *Fernandez* case was based. The scope of review in habeas corpus proceedings has been greatly enlarged since the *Fernandez* decision. The importance of this broader scope of review of state court judgments in criminal cases was made clear by the Court during the last term in *Townsend* v. *Sain*, 372 U.S. 293. It begs the question to assert as did the Court of Appeals, that the *Townsend* decision is inapposite in the field of international extradition. Impelling reasons exist why this Court should re-examine the holding in *Fernandez* in the light of the *Townsend* decision.

This Court has recognized that extradition proceedings are criminal in nature. *Grin* v. *Shine*, 187 U.S. 181, 187; *Rice* v. *Ames*, 180 U.S. 371, 374. It has

on occasion compared an extradition hearing with a preliminary hearing before a United States Commissioner on a criminal complaint. See *Collins* v. *Loisel*, 259 U.S. 309; *Orteiza y Cortes* v. *Jacobus*, 136 U.S. 330. The analogy while valid in some respects has inherent weaknesses. A preliminary hearing in a criminal case decides nothing except whether the defendant shall be held for the Grand Jury. A determination against an accused is followed by extensive proceedings in which the accused has the benefit of extensive procedural rights. An extradition hearing, however, is the only judicial proceeding available to the defendant except for habeas corpus proceedings. Consequently, the standard utilized by the District Court in reviewing the ruling of the Commissioner is of fundamental importance if defendants in extradition proceedings are to obtain the protection of their rights before the Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Constitutional and Statutory Provisions Involved

CONSTITUTION OF THE UNITED STATES—AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

TITLE 18, U.S.C. § 3184—CRIMINAL PROCEDURE

Fugitives From Foreign Country to United States

Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States, or any commissioner authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him to the Secretary of State, that a warrant may issue upon the requisi-

tion of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made. June 25, 1948, c. 645, 62 Stat. 822.

TITLE 18, U.S.C. § 3190—EXTRADITION

Evidence on Hearing

Depositions, warrants, or other papers or copies thereof offered in evidence upon the hearing of any extradition case shall be received and admitted as evidence on such hearing for all the purposes of such hearing if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that the same, so offered, are authenticated in the manner required. June 25, 1948, c. 645, 62 Stat. 824.

APPENDIX B

Opinion of the Court Below

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Dec. 14, 1963

No. 18,714

JAIME J. MERINO, *Petitioner-Appellant,*

v.

UNITED STATES MARSHAL, *Respondent.*

On Appeal from the United States District Court for the Southern District of California, Central Division

Before: CHAMBERS and JERTBERG, Circuit Judges and MURRAY, District Judge.

JERTBERG, Circuit Judge:

Before us is an appeal from a judgment of the United States District Court for the Southern District of California dismissing a petition for habeas corpus filed by appellant. Said petition for writ of habeas corpus was filed in the District Court after an adverse decision by the United States Commissioner following a hearing pursuant to the provisions of 18 U.S.C. §.3184. Following such hearing the Commissioner found as a fact, "that the evidence presented is sufficient under 18 U.S.C. § 3184 to sustain the charges under the provisions of the treaty, and" concluded "that the defendant should be surrendered to the proper officials of Mexico." From such findings and conclusion the Commissioner ordered "that the defendant stand committed to the custody of the United States Marshal without bail until the surrender shall be made."

Jurisdiction of the Commissioner to hear extradition matters is based on said Commissioner's Order of Appointment dated February 28, 1959, and pursuant to the pro-

visions of Title 18 U.S.C. § 3184 and the Treaty of Extradition between the United States of America and the Republic of Mexico, ratification exchanged April 22, 1899, proclaimed April 24, 1899 [31 Stat. 1818], amended by supplemental convention effective July 11, 1926 [44 Stat. 2409], again amended by supplemental convention effective April 14, 1941 [55 Stat. 1133.]

The District Court had jurisdiction to entertain appellant's petition for writ of habeas corpus pursuant to the provisions of Title 28 U.S.C. § 2241(a). This Court has jurisdiction to entertain this appeal under the provisions of Title 28 U.S.C. § 2253.

The extradition complaint filed February 1, 1960, as amended April 12, 1960, charges in essence that appellant is duly and legally charged with having committed in Mexico the crimes of falsification of the official acts of the Government or public authority and the uttering or fraudulent use of the same; and embezzlement of public funds by a public officer or depository, while employed by Petroleos Mexicanos, an agency of the Government of Mexico, in the capacity of superintendent of the District of Poza Rica, the State of Vera Cruz, Mexico, during the years 1957 and 1958.

The amended extradition complaint further charges that the appellant has been found outside the boundaries of the said Mexico; that a warrant for the arrest of appellant cannot be served in Mexico; and that the appellant has sought asylum within the jurisdiction of the United States of America and may be found in the State of California, City of Redondo Beach; and that said appellant is not a citizen of the United States of America.

Prior to the hearing before the United States Commissioner, appellant moved the Commissioner for an order authorizing the taking of depositions of certain persons residing in Mexico. Following denial of said motion by

the Commissioner appellant applied to the United States District Court for a writ of mandamus or, in the alternative a motion for an order directing the Commissioner to make an order authorizing the taking of the depositions. The District Court denied the application and motion. Upon appeal to this Court the appeal was dismissed. *Jaime J. Merino*, Appellant v. *Theodore Hocke, United States Commissioner, United States Marshal*, Appellees, reported 289 F. 2d 636 (9th Cir. 1961).

Following the hearing by the Commissioner under the provisions of 18 U.S.C. § 3184, appellant renewed his application for a Writ and Order to the District Court. Following denial of the renewed application and motion by the District Court, appeal from such denial was taken to this Court. The appeal was dismissed by this Court in *Jaime J. Merino*, Appellant, v. *Theodore Hocke, et al.*, Appellees, No. 18271 of this Court, ... F.2d .... (9th Cir. 1963).

The Treaty of Extradition between the United States of America and the Republic of Mexico, as amended, in pertinent part provides as follows:

ARTICLE II of the Treaty of February 22, 1899 [31 Stat. 1818] provides in pertinent part:

> "Persons shall be delivered up, according to the provisions of the convention, who shall have been charged with, or convicted of, any of the following crimes or offenses:
>
> "1. • • •
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> "2. • • •
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> "3. • • •
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> "4. • • •
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> "5. • • •
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> "6. • • •

"7. • • •

"8. • • •

"9. • • •

"10. The forgery, or falsification of the official acts of the Government or public authority, including courts of justice, or the utterance or fraudulent use of any of the same.

"11. • • •

"12. • • •

"13. Embezzlement or criminal malversation of public funds committed within the jurisdiction of either party by public officers or depositaries.

"14. • • •

"15. • • •"

ARTICLE III of the same Treaty provides in pertinent part as follows:

"Extradition shall not take place in any of the following cases:

"1. When the evidence of criminality presented by the demanding party would not justify, according to the laws of the place where the fugitive or person so charged will be found, his or her apprehension and commitment for trial, if the crime or offense had been there committed.

"2. When the crime or offense charged shall be of a purely political character.

"3. When the legal proceedings or the enforcement of the penalty for the act committed by the person demanded has become barred by limitation according to the laws of the country to which the requisition is addressed."

ARTICLE VIII of the same Treaty provides in pertinent part as follows:

"Requisitions for the surrender of fugitives from justice, under this present convention, shall be made by the respective diplomatic agents of the contracting parties, or, in the event of the absence of these from the country or from its seat of government, they may be made by superior consular officers.

"If a person whose extradition is asked for shall have been convicted of a crime or offense, a copy of the sentence of the court in which he was convicted, authenticated under its seal, with attestation of the official character of the Judge by the proper executive authority, and of the latter by the minister or consul of the respective contracting party, shall accompany the requisition.

"When, however, the fugitives shall have been merely charged with a crime or offense, a similarly authenticated and attested copy of the warrant for his arrest in the country where the crime or offense is charged to have been committed, and of the depositions upon which such warrant may have been issued, must accompany the requisition as aforesaid.

"Whenever, in the schedule of crimes and offenses of article 2nd, it is provided that surrender shall depend on the fact of the crime or offense charged being punishable by imprisonment or other corporal punishment according to the laws of both contracting parties, the party making the demand for extradition shall furnish, in addition to the documents above stipulated, an authenticated copy of the law of the demanding country defining the crime or offense, and prescribing a penalty therefor.

"The formalities being fulfilled, the proper executive authority of the United States of America, or of the

United Mexican States, as the case may be, shall then cause the apprehension of the fugitive, in order that he or she may be brought before the proper judicial authority for examination. If it should then be decided that, according to the law and the evidence, the extradition is due pursuant to the terms of this convention, the fugitive may be given up according to the forms of law prescribed in such cases"

18 U.S.C. § 3184 provides:

"§ 3184. *Fugitives from foreign country to United States*

"Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States, or any commissioner authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."

18 U.S.C. § 3190 provides:

§ 3190. *Evidence on hearing*

"Depositions, warrants, or other papers or copies thereof offered in evidence upon the hearing of any extradition case shall be received and admitted as evidence on such hearing for all the purposes of such hearing if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that the same, so offered, are authenticated in the manner required."

The hearing provided for by Section 3184 consumed approximately two weeks. On behalf of the appellee there was received in evidence, properly and legally authenticated, documents consisting of the petitions for the arrest of appellant for the offenses set forth in the amended complaint, warrants for the arrest of appellant, depositions in support of the warrants of arrest to which there were annexed many documentary exhibits, certifications as to the existence in the laws of Mexico of the offenses set forth in the amended complaint, and certifications as to the creation and the status and powers of Petroleos Mexicanos. In addition to the receipt in evidence of all of the foregoing documents, including the depositions of Mexican citizens whose testimony relate to the facts and circumstances surrounding the commission by the appellant of the offense charged in the amended complaint, there was also received into evidence on behalf of appellee the testimony of a member of the Bar of the Republic of Mexico, and a faculty member of the Law School of the University of Mexico, who qualified as an expert on the law of Mexico. The evidence received on behalf of appellant consisted of documentary exhibits, the testimony of appellant, the testimony

of two citizens of Mexico, and the testimony of the Foreign Law Librarian of the Los Angeles County Law Library who qualified as an expert on the laws of Mexico. The District Court ordered that all exhibits and the transcript of proceedings held before the United States Commissioner to be received in evidence in the habeas corpus hearing.

The pertinent provisions of the Criminal Code of the Republic of Mexico relating to the offenses set forth in the amended complaint are:

"ARTICLE 219: To the person who commits the crime of peculation there shall be applied from six months to twelve years of imprisonment, a fine from ten to three thousand pesos, and destitution from employment or trust, and inhabilitation for from two to six years."

"ARTICLE 220: Every person entrusted with the public service—of the State or an autonomous organization, commits the crime of peculation, even though it be in commission for a limited time and without his having the capacity of an official, who, for personal or alein uses, diverts, from their purpose, money, securities, real estate or any other thing pertaining to the State, to an autonomous organization, or to an individual, if for reasons of his capacity he should have received them in administration, in deposit or for any other cause."

"ARTICLE 243: The crime of forgery of public or private documents shall be punished with reclusion in jail for six months to three years and the fine of fifty to one thousand pesos."

"ARTICLE 244: The crime of forgery of documents is committed by any one of the following means:

"I.—By affixing a false signature or flourish, even though it be imaginary, or altering a true one.

"II.—By unduly profiting from another's signature or flourish in blank, drawing up an obligation, a libera-

tion or any other document that may jeopardize the property, the honor, the person or the reputation of another, or cause some prejudice to society, to the State or to a third party.

"III.—By altering the context of a true document, after it has been concluded or signed, if this should change its sense respecting any circumstance or point that is substantial thereto, whether adding, amending or erasing in all or in part one or more words or clauses, or varying the punctuation.

"IV.—By varying the date or any other circumstance relative to the time of the execution of the act expressed in the document.

"V.—By attributing to himself by the person who draws up a document, or attributing the person in whose name he draws it a name or an investiture, quality or circumstance which he does not possess, or that it is necessary for the validity of the act concerned.

"VI.—By writing a document in terms that change the convention executed in a diverse one, wherein the statement or profession of the grantor, the obligations which he purported to contract, or the rights which he should have acquired are changed.

"VII.—By altering clauses or statements, or asserting as true facts which are false, or as confessed those which are not, if the document whereon they are written down should be drawn up in order to make them appear as a proof thereof.

"VIII.—By issuing a supposed testimony of documents that do not exist; taking it from another existing one that lacks the legal requisites, falsely supposing that it has them; or from another that does not lack them, but adding or suppressing in the copy something which means a substantial deviation.

"IX.—By altering an expert translator or paleographer the contents of a document when translating or deciphering it."

On this appeal, appellant specifies as errors that the District Court erred:

1. In applying an incorrect standard to determine the sufficiency of the evidence presented to the United States Commissioner;

2. In failing to find the United States Commissioner abused his discretion in finding the evidence sufficient to certify appellant extraditable an failing to find there was no showing before the Commissioner of probable cause to believe that appellant committed any offense within the treaty with the Republic of Mexico;

3. In failing to find either the matters presented before the United States Commissioner taken as a whole, establish that the statute of limitations of the Republic of Mexico had run on the offenses charged, or that the offenses charged against appellant did not fall within the Extradition Treaty; and

4. In failing to find appellant had been denied due process of law and a fair hearing before said United States Commissioner by said Commissioner's refusal to authorize the taking of depositions in the Republic of Mexico.

On this appeal it is not questioned that the United States Commissioner had jurisdiction to conduct the hearing provided for by 18 U.S.C. § 3184.

Appellant's contention that the District Court applied an incorrect standard in determining the sufficiency of the evidence presented to the United States Commissioner to support his order of extradition is based on the District Court's statement that the test was "whether there was any evidence warranting the finding of probable cause to

believe the accused was guilty." In this connection the District Court stated:

> "Upon an examination of the transcript this court is satisfied that there was evidence before the Commissioner upon which he could come to the conclusion that there was probable cause to believe that defendant should be held to answer the charge."

In our view the test laid down by the District Court, in the above quoted statements of the District Court, to determine the sufficiency of the evidence which was before the United States Commissioner is correct. In *Fernandez* v. *Phillips*, 268 U.S. 311 (1925), the Supreme Court stated at page 312:

> "The alleged fugitive from justice has had his hearing and habeas corpus is available only to inquire whether the magistrate had jurisdiction, whether the offense charged is within the treaty and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty."

To the same effect see *Bingham* v. *Bradley*, 241 U.S. 511, 516-17 (1916); *McNamara* v. *Henkel*, 226 U.S. 520, 523 (1913); and *Cleugh* v. *Strakosch*, 109 F. 2d 330, 333 (9th Cir. 1940).

Appellant contends that the decision of the Supreme Court in *Townsend* v. *Sain*, 372 U.S. 293 (1963) "represents a drastic departure from the rules which heretofore appeared to limit the power of Federal Courts to review factual determinations in habeas corpus proceedings." *Townsend* involved a habeas corpus Federal Court hearing in which the prisoner, who had been convicted following trial in the State Court, claimed a deprivation of rights under the Constitution of the United States. We believe

such case to be inapposite in the field of international extradition.

It is clear to us that the offenses set forth in the amended complaint are offenses defined and made punishable under the provisions of the Criminal Code of the Republic of Mexico, and are offenses set forth in the Extradition Treaty existing between the United States and Mexico.

The expert witnesses differed in their opinions as to whether or not Petroleos Mexicanos is an agency or authority of the Government of Mexico; whether or not its funds are public funds; whether or not its acts are governmental; and whether or not appellant as Superintendent of Petroleos Mexicanos in the District of Poza Rica was or was not a public officer.

Such conflicts were resolved by the Commissioner adversely to the contentions of appellant. The credibility of witnesses and the weight to be accorded their testimony are within the province of the Commissioner.

From our review the competent evidence of criminality in the record is sufficient to have justified, according to the laws of the State of California, appellant's apprehension and commitment for trial if the offenses set forth in the amended complaint had been committed in the State of California. The weight and sufficiency of the evidence was for the determination of the Commissioner. *Cleugh* v. *Strakosch, supra.*

The expert witnesses also differed in their opinions as to the period of the statute of limitations under the Criminal Code of the Republic of Mexico. The law appears to be well settled that in the absence of treaty provisions, the statute of limitations may not be raised in extradition proceedings. *Hatfield* v. *Guay*, 87 F.2d 358, at 364 (1st Cir. 1937); *First National City Bank of New York* v. *Aristeguieta*, 287 F. 2d 219, at 227 (2nd Cir. 1960).

Attention is called to the provisions of paragraph 3 of Article III of the Treaty, which provides that extradition shall not take place when the legal proceedings, or the enforcement of the penalty for the act committed by the person demanded "has become barred by limitation according to the laws of the country in which the requisition is addressed." The statute of limitations on Federal crimes in the United States is five years for non-capital offenses. *18 U.S.C. § 3282.* Section 799 of the Penal Code of California provides that there is no time within which a prosecution for the embezzlement of public monies and the falsification of public records must be commenced, and such prosecution may be commenced at any time after the discovery of the crime.

The record reveals that the appellant was relieved from his duties as Superintendent for Petroleos Mexicanos of the District Court of Poza Rica on December 28, 1958, and was apprehended in the County of Los Angeles, State of California, on February 1, 1960. The Commissioner did not err in concluding that prosecution of the offenses set forth in the amended complaint was not barred by the statute of limitations.

Finally appellant argues that he was denied due process of law and a fair hearing before the Commissioner because of the Commissioner's refusal to authorize the taking of depositions in Mexico.

It is to be noted that the proceedings against appellant were in the nature of a preliminary hearing, and the purpose of the proceedings was not to determine the guilt of the appellant of the offenses set forth in the amended complaint beyond all reasonable doubt but only to determine that the offenses had been committed and that there was probable cause for belief that the appellant committed them. It is also to be noted that appellant was permitted to testify in his own behalf and that there is in the record the testimony of two *live* witnesses from Mexico who gave

testimony on behalf of appellant. Appellant has cited no authority resting in the Commissioner to compel the taking of depositions in Mexico or, if authorized, that such order would have had any legal effect in Mexico. In seeking the order for the taking of the depositions appellant cites in the points and authorities submitted to the District Court, Rule 15(a) Federal Rules of Criminal Procedure, Rule 26 Federal Rules of Civil Procedure, 28 U.S.C. § 1781 and 18 U.S.C. § 3191.

Rule 15(a) provides for defense depositions under certain situations in the course of Federal prosecutions and provides that the appropriate motion must be made "after the filing of an indictment or information * * *." Such rule does not provide for the use of defense depositions at preliminary examinations. Furthermore, Rule 54(b) (5) of said rules provides that the said rules of Criminal Procedure "are not applicable to extradition and rendition of fugitives; * * *"

Rule 26, Federal, Rules of Civil Procedure provides for the taking of depositions in civil actions. Appellant cites no authority that such rule is applicable to the field of international extradition.

Title 28 U.S.C. § 1781 provides that a court of the United States may issue letters rogatory or a commission to take depositions in foreign countries. There is nothing in the record to indicate appellant requested letters rogatory of a court of the United States.

Title 18 U.S.C. § 3191 provides:

"§ 3191. *Witnesses for indigent fugitives*

"On the hearing of any case under a claim of extradition by a foreign government, upon affidavit being filed by the person charged setting forth that there are witnesses whose evidence is material to his defense, that he cannot safely go to trial without them, what he expects to prove by each of them, and that he is not possessed of sufficient means, and is actually un-

able to pay the fees of such witnesses, the judge or commissioner hearing the matter may order that such witnesses by subpoenaed; and the costs incurred by the process, and the fees of witnesses, shall be paid in the same manner as in the case of witnesses subpenaed in behalf of the United States."

It appears that the statute is designed to secure, on behalf of indigent fugitives, the attendance of resident witnesses at the hearing provided for by the provisions of 18 U.S.C. § 3184, and not witnesses residing in a foreign country since the attendance of witnesses residing in a foreign country would not be compellable by subpoenas. Furthermore, the statute requires the filing of an affidavit by the person charged, that he is not possessed of sufficient means and is actually unable to pay the fees of such witnesses. No such affidavit was filed in the instant case. See *Jimenez* v. *Aristeguieta*, 311 F.2d 547 (5th Cir. 1962).

Finally, in support of his contention that he was denied due process of law and a fair hearing by the Commissioner's refusal to authorize the taking of depositions in the Republic of Mexico, appellant cites many decisions of the courts of California wherein the rights of persons accused of crime in that state have been expanded in the pretrial and trial stages. Also cited are the following decisions of the Supreme Court: *Elkins* v. *United States*, 364 U.S. 206 (1960); *Jencks* v. *United States*, 353 U.S. 657 (1957); *Brady* v. *Maryland*, 373 U.S. 83 (1963). In our view the principles set forth in the cases relied upon are not applicable to a preliminary examination in an international extradition case. See *Oteiza y Cortes* v. *Jacobus*, 136 U.S. 330 (1890).

The order appealed from is affirmed.

(Endorsed) Opinion Filed December 14, 1963.

Frank H. Schmid, Clerk.

APPENDIX C

Notice and Motion to Take Depositions and Affidavit in Support Thereof

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

In the Matter of the Extradition of

JAIME J. MERINO,

A Fugitive from the Justice of Mexico

Notice of Motion

To: LAUGHLIN E. WATERS, *United States Attorney.*

To: ERNEST A. LONG, *Assistant United States Attorney.*

You and each of you please take notice that on May 5, 1960, before the Honorable Theodore Hocke, United States Commissioner, Southern District of California, Central Division, Jaime J. Merino, by and through his counsel, will move the said Commissioner for an order authorizing the taking of depositions.

This Motion will be based on the records and files in the above-entitled cause, the instant Notice of Motion, the Motion attached hereto, the Affidavit attached hereto and the Points and Authorities attached hereto, in addition to any and all matters which shall be presented at the time of the hearing on said Motion.

Respectfully submitted,

SHEELA, O'LAUGHLIN & HUGHES

By /s/ PETER J. HUGHES
Peter J. Hughes

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

In the Matter of the Extradition of

JAIME J. MERINO,

A Fugitive from the Justice of Mexico

Motion

Jaime J. Merino, in the above-entitled cause, by and through his counsel, hereby moves the Honorable Theodore Hocke, United States Commissioner, Southern District of California, Central Division for an order authorizing the taking of depositions of the parties whose names are set out in the Affidavit of Barton C. Sheela, Jr., attached hereto.

This Motion is based on the records and files in the above-entitled cause, the Notice of Motion attached hereto, the instant Motion, the Affidavit attached hereto, the Points and Authorities attached hereto and any and all matters which may be presented at the time of the hearing on this Motion.

Respectfully submitted,

SHEELA, O'LAUGHLIN & HUGHES

By /s/ PETER J. HUGHES
Peter J. Hughes

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

In the Matter of the Extradition of

JAIME J. MERINO,

A Fugitive from the Justice of Mexico

Affidavit

BARTON C. SHEELA, JR., being duly sworn, deposes and says:

1. That he is an attorney licensed to practice in the State of California.

2. That he, along with John F. O'Laughlin and Peter J. Hughes, represents Jaime J. Merino in extradition proceedings currently pending in the Federal District Court, of Los Angeles, California.

3. Affiant states that he, along with co-counsel, have examined the Mexican Government's requisition for extradition of this case along with the supporting documents and affidavits and that they have determined that the charges against the said Jaime J. Merino brought in Mexico, stem from three groups of transactions as follows:

1. That allegation that Jaime J. Merino caused certain "ghost" contracts to be written for the construction and painting of two gas holders (tanks).

2. That Jaime J. Merino caused to be issued certain contracts for work which was not done and work which was improperly done and work which was done in part with equipment and personnel supplied by PeMex Corporation, as distinguished from the contractor, without deductions from the price paid to the contractor.

3. The contracts which were initiated between PeMex by Engineer Jaime J. Merino and Manuel Porcel Blanco for

the construction and readjustment of certain water lines and the purchase of the supplies necessary to carry out the contracts, are alleged to have been done with equipment, personnel and materials loaned by PeMex Corporation. The statement that this work was done under Jaime J. Merino's orders and that the money was drawn by the contractor from PeMex Corporation, returned to Jaime J. Merino, who in turn used it to pay the traveling expenses of the PeMex Corporation basketball team.

That affiant states that it is necessary to obtain an order of the United States Commissioner to take the depositions of the witnesses later named in this affidavit for the following reasons:

1. That absent some order of the Commissioner authorizing the taking of depositions of the people named, affiant, his co-counsel and his representatives would be mere interlopers in Mexico and would have no apparent authority to appear in the Mexican courts or before Mexican judicial officials for the purposes of taking depositions of the necessary and material witnesses in this matter in a form which would be admissible in evidence before the Commissioner.

2. Affiant states that if the United States Commissioner were to make such an order, the Mexican Government and its judicial officials interested in the extradition of Jaime J. Merino would give affiant, his co-counsel and representatives in Mexico standing to take such depositions so as to produce said evidence in this hearing.

3. Further affiant is informed and believes that some of the witnesses later named in this affidavit are in the custody of Mexican authorities.

Affiant states that the following named persons' testimony is necessary and material in Merino's defense to the charge of the embezzlement of public funds by a public officer or by a depository of public funds and the falsifica-

tion of official records or acts of public authority in connection with the construction and painting of the gas holders and Jaime J. Merino can not safely go to hearing without the evidence of the following:

1. Pedro Pora, James Ruthrot, Guillermo Vasques Ponce, Fidel Meza, Cutberto Castillo, all who reside in Poza Rica, Vera Cruz, Mexico, and will testify to the following:

(a) That the cost of Amercoat paint was in excess of the total value of the contract awarded for the painting of the tanks.

(b) That the paint was imported from the United States exclusively by the PeMex Corporation in Poza Rica.

(c) That the tanks in question were prepared and constructed in accordance with the contracts and that the best known tank construction foreman, Ladislao Gallegos, and his personnel were employed and use in the performance of said contract.'

Fidel Meza will also testify and identify documents on file at PeMex that show the purchase of Amercoat paint and the cost price of such paint. Further that no contractor would be able to submit the bid for the painting of said tanks at the price listed in the Mexican Government's demand for extradition.

2. Jose Penafiel who resides in Poza Rica, Vera Cruz, Mexico, who will testify that the tanks or gas holders were constructed in accordance with the plans and specifications of the contracts by tank foreman, Ladislao Gallegos and his personnel, and that Mr. Gallegos is one of the better known tank constructors and contractors in Poza Rica.

3. Ladislao Gallegos of Poza Rica, Vera Cruz, Mexico, who will testify to the names of all workers who were employed by him in the construction of said gas holders and the amounts paid by him to construct the tanks and the

amounts received by him to construct the tanks in accordance with the contracts that were awarded to Carlos Osornio by Petroleos Mexicanos (PeMex).

4. CARLOS OSORNIO, who is incarcerated at the City Jail, Tuxpan, Vera Cruz, Mexico, who will state that threats and promises were made against him by PeMex officials and Government officials which caused him to make the false statement against Jaime J. Merino.

In connection with the charge that Jaime J. Merino embezzled public funds and falsified records in connection with the contracts made with the Oil Workers Union, District 30 representatives, the testimony of the following witnesses is material to the defense of Jaime J. Merino who can not safely go to the hearing without such evidence.

1. JOSE MARIA CARDENAS, who resides at Avenida 2 Norte, #19, Poza Rica, Vera Cruz, Mexico and Tomas Galindo, Poza Rica, Vera Cruz, Mexico, who will testify that the highest authority of PeMex (all superiors to Mr. Merino) ordered Mr. Merino to help the Oil Workers Union syndicate to form a contracting corporation made up of Union members and that the profits from the contracting business were to be paid into the Union treasury. They will further testify that the contracts entered into by PeMex with the syndicate of workers from the Oil Workers Union, District 30, caused the saving to PeMex of at least 75% of its labor costs and they will further testify that all of the pipe line contracts with the Oil Workers Union syndicates were fulfilled.

2. THE TREASURER of the Oil Workers Union, Section 30, who will state that each and every contract entered into by the Oil Workers Union was in fact entered into for and on behalf of the Oil Workers Union. That the Oil Workers Union received the total amounts shown on these contracts and that the Oil Workers Union never returned

any of the monies received for the benefit of any person other than members of the Oil Workers Union.

3. THE CUSTODIAN of the records of the Oil Workers Union, District 30, who will identify:

(a) The minutes of the Oil Workers Union, District 30, Poza Rica, Vera Cruz, which reflect the meetings at which the contracts entered into by the syndicate of the Oil Workers Union were approved by the membership of the Oil Workers Union, Section 30.

As to the charges that Jaime J. Merino made false documents and embezzled public monies in connection with contracts involving water lines for the purpose of benefiting the PeMex Corporation basketball team, the testimony of the following witness is required and material to Merino's defense and he can not safely go to the hearing without such evidence.

(a) ROBERTO TAYLOR, who is domiciled at the Palacio Muncipal de Poza Rica, Vera Cruz; Agustin Garcia, Colonia Herradura Campo de Poza Rica, Vera Cruz; Hernando Zamora, Queretaro #200, Mexico City, D.F., Mexico; Rogelio Villegas Flores, Magon #312, Colonia Tajim, Poza Rica; Alvaro Ramirez, Independencia #309, Colonia Manuel Avila Camacho, Poza Rica, Vera Cruz; Manuel Montes de Oca, Uruguay #114, Colonia Merino, Poza Rica; Raul Melo, Av. 8 Norte, #18 Col. Obrera, Poza Rica; Ignacio Renteria, Colonia Loma Bonita, Campo de Petroleos, en., Poza Rica; Arturo Escalera, Cancha Antonio J. Bermudez, Poza Rica; Horacio Estrada Av. 4 Norte #9 Colonia Obrera, Poza Rica; Dr. Ernesto Aracen, Colonia Loma Bonita #3 Campo Petroleos, Poza Rica; Gregorio Franco, Constitucion #706 Col. Tajim, Poza Rica; Daniel Cuevas Nino, Domicilio conocido Poza Rica, Rafael Palacios Ramirez, domicilio conocido, Poza Rica; Ricardo Zurita, domicilio conocido, Poza Rica; Juan Salas, domi-

cilio conocido, Poza Rica; Fernando Rojas, Popotla #20, Tacuba, D.F., Noe de la Cruz, Avenida 2 Norte #9, Poza Rica; Perulo de la Cruz, Avenida 2 Norte #9, Poza Rica; Hector Ligas, domicilio conocido, Poza Rica; Alonso Ramirez, domicilio conocido, Poza Rica; Jose Madrigal, domicilio conocido, Poza Rica, who will state that they were members of sports teams of the oil workers of Poza Rica and all their expenses as members of the sports teams were paid by Petroleos Mexicanos.

(b) Alfonso Zunzuneguie, who will state that only 150 pesos per year were allocated into the budget of Petroleos Mexicanos for the benefit of the recreational and sporting activities of the oil workers in the Poza Rica area. He will further testify that it was authorized and accepted practice by all of the resident supervisors of PeMex and the various oil fields and oil camps and for the headquarters athletic teams to spend sums far in excess of the amount allowed in the budget. That it was accepted practice and was ordered by the superiors and the highest authority in PeMex that the recreational activities such as the PeMex Corporation basketball team, the PeMex baseball teams and the oil workers sporting teams all be supported by funds saved or appropriated from other contracts and appropriations of the PeMex budget;

(c) Mario Nolivos and Agustin Espinoza who were members of the Petroleum Union, Section 30, and who reside in Poza Rica, will testify that Mr. Merino's duty was as resident superintendent of the plant at Poza Rica. That one of his duties was to act as coordinator and to conduct the recreational activities of PeMex employees and the union laborers.

(d) Bimbo Villegas, Becerril Fernandez and Bernardo Lopez, who will testify that they were members of sporting teams sponsored by PeMex and the Oil Workers Union in districts other than Poza Rica and they will state that

the expenses and wages were paid in these other districts by Petroleous Mexicanos in the same manner and fashion as they were in Poza Rica.

As to all three charges of embezzlement and falsification of records of public authority or public records, the testimony of the following witnesses is material to the defense of Jaime J. Merino and he can not safely go to the hearing without the following evidence:

1. Raul Govea Mena, who is incarcerated at the City Jail, Tuxpan, Vera Cruz, Mexico, who will testify and give the names of persons who are currently in custody at the City Jail, Tuxpan Vera Cruz, and who were present when Carlos Osornio was coerced and pressured to give false evidence against Jaime J. Merino.

2. Alfonso Ortuno, who is also incarcerated at the City Jail, Tuxpan, Vera Cruz, Mexico, who will testify to the names of other individuals who were present at a time when he was coerced into giving false statement against Jaime J. Merino.

3. Juan Crisostomo Robles Ramirez and Gustavo Monzon and Engineer Jose Luis Mejia, all of Poza Rica, who will testify as to the manner in which certificates of payment were made by PeMex in connection with the contracts mentioned in this extradition and all contracts. They will further testify that the certificates of payment were not formulated or originated by Engineer Jaime J. Merino and that Engineer Merino only signed said certificates of payment after three signatures had been placed on the document prior to his signature and that the signatures of the prior signers were to indicate to the resident superintendent that the document was in accordance with the terms of the contract for which the payment was being made.

4. Carlos Lopez Mata of Primera Poniente and Sexta Norte in Tapachula, Chiopax, Mexico, as well as Juan

Vara Orozco, whose address is house number 23, interior of the field of Petroleos Mexicanos, and Gustavo Monzon, who is at present incarcerated in the City Jail, Tuxpan, Vera Cruz, Mexico, as well as Carlos Lorenzo, whose address is the interior of PeMex camp, Poza Rica, who will testify that the contracts were not formulated by Jaime J. Merino. That the contracts were all formulated by Mr. Del Valle, a representative of the central control office of PeMex in Mexico City, who was in Poza Rica as a representative of that office, whose job it was to make and supervise all contracts involving more than 10,000 pesos. That said Del Valle was not a subordinate of Mr. Merino but was independent of him and was a watch dog of the treasury of PeMex stationed at Poza Rica. That he supervised and signed all contracts and that his signature was always placed on said contracts prior to the time they were submitted to Jaime J. Merino for signature. That in the event the expenses were greater on any contract than planned, Del Valle consulted with the head of the Construction Department in Mexico City or with the Manager of Exploitation in Mexico City, and if those officials approved the contracts, he ordered the amendments in the standard "machotes" which were signed in his office by approximately six persons before they were submitted to Engineer Jaime J. Merino for signature.

Carlos Lopez Mata will also state that he prepared lists of work and sent these lists to the various contractors who submitted bids. That the bids were received by him and that the bids received were discussed with Engineer Merino and that the successful bidder was chosen by them and awarded the job.

5. Jose Maria Cardenas, who resides at 2 Norte 19, Poza Rica, as well as Rutillo Torres who resides in Guadalajara, Jalisco, Mexico, will state that the contractors were not chosen arbitrarily by Mr. Merino because Lopez Mata, head of the Building Department sent out a list of work to

contractors who submitted bids. That the bids were discussed by Merino and Lopez Mata and were chosen by both as to their ability to perform.

6. Alberto Lazo, Vallarta No. 1, Office No. 9, who will testify as to the names of persons who know the circumstances under which Carlos Lopez Mata was coerced to give false statements against Mr. Merino.

7. Carlos Osornio who is incarcerated at the City Jail, Tuxpan, Vera Cruz, Mexico, who will testify that the statements that he gave against Jaime J. Merino were false and he will also testify as to the threats and promises which caused him to make said false statements incriminating Jaime J. Merino.

8. The custodian of the following records who will establish the existence of the records and exemplify copies thereof:

(a) Custodian of the Dairo Oficial de la Federation to establish the authenticity of said Dairo Oficial de la Federation as to the following dates:

November 25, 1936; August 24, 1939; April 29, 1942; December 2, 1944; January 31, 1948; November 29, 1953. The said documents will indicate the events which will describe the legal character and status of PeMex, and its employees and will show that PeMex is not a branch of the Government, it is not a public authority and that its employees are not public officials, and that the funds it controls are not public funds.

(b) The Custodian of the Presidential Decree of June 7, 1938, which identifies the legal status of PeMex, of its funds and its employees, and which also establishes that the status of PeMex is not that of a public agency or a public authority and that its funds are not public funds and its employees are not public officials.

(c) The Custodian of the Federal Budget of the Republic of Mexico for the years 1939 to 1960, to identify

the budgets which show the legal status of PeMex, its funds, its sources of funds and the nature and legal status of its employees.

Further affiant sayeth not.

Respectfully submitted,

BARTON C. SHEELA, JR.
Attorney for Jaime J. Merino

Duly subscribed and sworn to before me this ——day of April, 1960.

Notary Public in and for the County of San Diego, State of California

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 1188

JAIME J. MERINO, PETITIONER

v.

UNITED STATES MARSHAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In 1960, pursuant to the extradition treaty between the United States and Mexico, a complaint was filed for the extradition to Mexico of petitioner, formerly a district superintendent of Petroleos Mexicanos, commonly known as Pemex, an agency of the government of Mexico. The complaint, as amended, showed that petitioner had been duly charged in Mexico with the crimes of embezzlement of public funds, falsification of official acts and the uttering and use thereof for fraudulent purposes. After a hearing of approximately two weeks, the Commissioner, on June 12, 1961, entered an order finding that petitioner was extradictable.

734-491—64

On June 21, 1961, petitioner filed in the United States District Court for the Southern District of California a petition for a writ of habeas corpus in which he challenged the order of the commissioner. The writ was dismissed on April 3, 1963.[1] The order of the district court was affirmed by the court of appeals on December 14, 1963, with an opinion reported at 326 F. 2d 5. A petition for rehearing was denied on January 21, 1964. Petitioner obtained two extensions of time to file his petition for a writ of certiorari, and his petition was filed within the extended time on June 5, 1964.

The government submits that there is no occasion for further review of this case in which the just demands of a foreign government have already been long delayed.

1. At the extradition hearing, it was shown that Petroleos Mexicanos, or Pemex, is a decentralized public institution of Mexico which was created in 1938 for the management of expropriated petroleum companies and the exploitation of petroleum resources (Tr. 52–54). From 1942 through 1958 petitioner was the superintendent of the Poza Rica district of Pemex, a district which accounted for 81% of the total Mexican oil production (Tr. 306–307, 309, 443). In this capacity petitioner authorized and signed between 300 and 500 construction and improvement contracts a month (Tr. 107, 382–384, 490). Without petitioner's signature, the last to be subscribed, the

[1] Petitioner was ordered by the Commissioner to be held without bail. He was, however, admitted to bail in the habeas corpus proceedings.

contracts were valueless (Tr. 128, 488). Petitioner also signed about 500 vouchers a month authorizing payments under these contracts (Tr. 384–385, 534).

In 1957 and 1958 petitioner selected Carlos Osornio, an employee of Pemex whom he trusted, to receive indirectly the benefit of four contracts for the construction and painting of gas tanks (Tr. 92, 97–99, 108–109). Osornio could not be named as the contractor as he was a Pemex employee (Tr. 99). To avoid this difficulty petitioner ordered that the contracts be awarded for record purposes to Raul Govea and Alfonso Ortuno (Tr. 100, 108–109). Govea, a laborer who had no means of performing the work required by the contracts, agreed to "loan" his name and sign the contracts at the request of Osornio (Tr. 91–93). Ortuno also agreed to sign as a contractor. The work was actually performed by an independent contractor with the aid of materials and personnel of a Pemex department (Tr. 93–94, 98–99, 100, 102, 112), but payments were made to Govea and Ortuno, the contractors of record (Tr. 94, 95, 109–112). Govea and Ortuno turned the money over to Osornio, who paid for various contract materials not furnished by Pemex, and who then delivered the remainder of the money, about 8,000 to 10,000 pesos, to petitioner for "social business" (Tr. 96, 98–99, 102–103). Petitioner gave 1,000 or 2,000 pesos back to Osornio (Tr. 99–100).

Petitioner arranged to have funds for travel expenses of Pemex sports teams paid by false contracts for work already performed or kickbacks from a contractor (Tr. 113–115). Petitioner also made pay-

ments every week to Benito Berman, the head of an organization of unemployed union members (Tr. 116–117). A contract was drawn calling for payment of an equivalent sum in return for specified work (Tr. 116). The specified work was not intended to be done. It had already been done, or was subsequently done wholly or party by Pemex equipment and personnel (Tr. 116–118, 124–128).

Petitioner, testifying in his own behalf, admitted receipt of money from Osornio but claimed it was a contribution for a hospital (Tr. 425–426, 527-528). He also admitted that other contractors had made contributions to his hospital committee (Tr. 542–548). Petitioner also offered as a witness Roberto Taylor who testified that the general manager of Pemex had authorized the use of Pemex equipment by workers on contracts (Tr. 764–765). Petitioner offered the testimony of a Mr. Stern, the foreign law librarian of the Los Angeles County Law Library, to the effect that Pemex was not a public institution and petitioner was not a public employee (Tr. 590 ff.).

Petitioner asserts that the district court erred when, in reviewing the sufficiency of the evidence to show probable cause, it stated

> Upon an examination of the transcript this court is satisfied that there was evidence before the Commissioner upon which he could come to the conclusion that there was probable cause to believe that defendant should be held to answer the charges.

He argues that the district court should itself have made the finding of probable cause. But even in

habeas corpus, after an adjudication of guilt, it is not the function of the habeas corpus court to review the sufficiency of the evidence. *Sunal* v. *Large,* 332 U.S. 174. It is as true now, as it was at the time of the earlier decisions of this Court, that it is not the function of an extradition proceeding to decide guilt or innocence, but merely to determine whether there is sufficient probable cause to justify the United States in turning over the accused to the demanding country for a trial under its laws for the offense which is alleged to have been committed in that country. See *Fernandez* v. *Phillips,* 268 U.S. 311; *Charlton* v. *Kelly,* 229 U.S. 447; *Jimenez* v. *Aristeguieta,* 311 F. 2d 547 (C.A. 5), certiorari denied, 373 U.S. 914. The facts show that by any standard there was in this case ample evidence to sustain a finding of probable cause to subject petitioner to a trial.

2. Before, during and after the hearing, petitioner applied for an order of the Commissioner authorizing him to take depositions of certain witnesses in Mexico (see Pet. App. 20–29). The Commissioner denied the motion, apparently on the authority of the decision of this Court in *In re Luis Oteiza y Cortes,* 136 U.S. 330, 336–337, holding that there is no authority to accept evidence by deposition on behalf of the accused in an extradition proceeding. The court of appeals declined to review the matter on mandamus before a final order finding petitioner extraditable (289 F. 2d 636 and 324 F. 2d 687), but did consider the validity of this ruling in its opinion affirming the denial of the petition for a writ of habeas corpus. The court of appeals found it un-

necessary to consider whether testimony by deposition could be offered by an accused in an extradition hearing, for, as it correctly pointed out, in its opinion (Pet. App. 16), petitioner had shown "no authority resting in the Commissioner to compel the taking of depositions in Mexico or, if authorized, that such order would have any legal effect in Mexico."

The issue which petitioner seeks to raise, whether this Court should overrule the *Oteiza* holding that evidence by deposition cannot be received on behalf of the accused, is thus not presented by this case. The only issue which this record presents is whether the Commissioner should have ordered the taking of depositions. Petitioner has shown neither the necessity nor the authority for such an order. Petitioner did not need any order to take depositions under Rule 28 of the Rules of Civil Procedure, but he made no effort to take depositions under that rule. Petitioner did not ask any court for letters rogatory under 28 U.S.C. 1781. He did not even present any affidavits by the persons whose testimony he sought to take by deposition. Petitioner cannot challenge the holding of *Oteiza* that testimony other than that of live witnesses is inadmissible when he did not show any proper attempt to get the testimony in written form.[2] He cannot assert error in the failure of the Commissioner to act when he showed no statutory authority for the Commissioner to grant the order sought, while he himself failed to use the procedures that were available to him.

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[2] Petitioner did produce at the hearing one of the witnesses whose deposition he sought, Roberto Taylor (Tr. 748, see Pet. App. 21).

Moreover, it is evident from the application (Pet. App. 20–29) that the evidence which petitioner sought to adduce was not the type of evidence which bore on probable cause, but was at most evidence which might relate to possible defenses which he might offer in a trial on the merits. That is not proper evidence in an extradition hearing. See *United States ex rel. Petrushansky v. Marasco*, 215 F. Supp. 953 (S.D.N.Y.), affirmed, 325 F. 2d 562, certiorari denied, 376 U.S. 952.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

JUNE 1964.

U.S. GOVERNMENT PRINTING OFFICE: 1964